87-477

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALBERT J. FERENS & MARGARET L. FERENS, His Wife
Petitioners

v.

DEERE & COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Arnold Levin
Counsel of Record
David J. Perlman
LEVIN & FISHBEIN
320 Walnut Street
Suite 600
Philadelphia, PA 19106
(215) 592-1500

and

Stanley V. Ostrow
FINKEL, LEFKOWITZ, OSTROW
& WOOLRIDGE
800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

Attorneys for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

Where there are sufficient minimal contacts for a state to exercise jurisdiction over a defendant foreign corporation, can a United States District Court that is a transferee forum under 28 U.S.C. 1404(a) refuse to apply the procedural rules of that transferor state, including its statute of limitations, on the ground that applying the transferor state's procedural rules violates the due process and full faith and credit clauses, where such a holding contravenes the holdings of the highest state and federal courts of the transferor state?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the case.

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Petitioners

v.

DEERE & COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Albert J. Ferens and Margaret L. Ferens, his wife, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for Third Circuit entered on May 28, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 819 F.2d 423 (3rd Cir. 1987) and appears in the Appendex hereto at A-1. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 639 F. Supp. 1484 (W.D. Pa. 1987) and appears in the Appendix hereto at A-17.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit, entered on May 28, 1987, affirms dismissal of actions based on theories of negligence and strict liability. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on July 9, 1987, which appears in the Appendix hereto at A-33. This petition for certiorari was filed within ninety (90) days of that date. Although the Court of Appeals denied a motion to stay the mandate (A-34), an appeal to this Court is not precluded by that denial.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the Constitution provides in pertinent part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

Article IV §1 of the Constitution provides:

> Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other state.

28 U.S.C. §1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

42 Pa. Cons. Stat. Ann. §5524 (Purdon 1981) provides in pertinent part:

> The following actions and proceedings must be commenced within two years:
>
> * * *
>
> (2) an action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence of another.

Miss. Code Ann. §79-1-27 provides:

> Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to

> suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.

Miss. Code Ann. §79-3-229 provides in pertinent part:

> The registered agent so appointed by a foreign corporation authorized to transact business in this state shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served.

STATEMENT OF THE CASE

On July 5, 1982, while cleaning a combine manufactured by respondent, petitioner Albert J. Ferens was injured. The accident occurred in Pennsylvania. Petitioner was a Pennsylvania resident, and he purchased his combine in Pennsylvania. Respondent is a Delaware Corporation with its principal place of business in Illinois. Respondent, however, does business in Mississippi and has a registered office in Mississippi, where it accepts service of process. Pursuant to Miss. Code Ann. §79-1-27 and §79-1-229, respondent has submitted to the jurisdiction of Mississippi courts. *Neirbo Co. et al. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 153 (1939); *Ex Parte Schollenberger*, 96 U.S. 369 (1877). On July 3, 1985, the petitioners filed an action in the United States District Court for the Western District of Pennsylvania, alleging breach of express and implied warranties of merchantability and fitness for use, for which the statute of limitations is four years. On July 25, 1985, the petitioners filed an action for the same injuries in the United States District Court for the Southern District of Mississippi under the doctrines of negligence and strict liability. The Mississippi statute of limitations for such actions is six years. Miss. Code Ann. §15-1-49 (1972). That action, while viable in Mississippi, was barred in Pennsylvania by Pennsylvania's two year statute of limitations. 42 Pa. Cons. Stat. Ann. §5524(2) (Purdon 1981). After respondents filed an answer to the Mississippi Complaint, the petitioners moved for transfer to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a).[1] The District Court for the Southern District of Mississippi then transferred the action to the Western District of Pennsylvania on forum non conveniens grounds under 1404(a).

Respondent moved for summary judgment on the negligence and strict liability claims, asserting that they were barred by Pennsylvania's two year statute of limitations, 42 Pa. Cons. Stat. Ann. §5524(2) (Purdon 1981). Respondent made this argument despite this Court's holding in *Van Dusen v. Barrack*,

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1. Jurisdiction in the Southern District of Mississippi was based on 28 U.S.C. §1332, diversity of citizenship.

376 U.S. 612 (1964) that a transferee district court must apply the state law that would have been applied if there had been no change of venue and despite the clear authority that a Mississippi court would apply the six-year statute of limitations. *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654 (1930); *Cowan v. Ford Motor Co.*, 694 F. 2d 104 (5th Cir. 1982) [*Cowan I*]; *Cowan v. Ford Motor Co.*, 714 F. 2d 100 (5th Cir. 1983) [*Cowan II*]; *Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983) [*Cowan III*]. Indeed, this Court, in *Van Dusen v. Barrack, supra*, explicitly approved of *Headrick v. Atchison, T. & S.F.R. Co.* 182 F.2d 305 (10th Cir. 1950), where the forum state's statute of limitations applied after the case was transferred under 1404(a) to a jurisdiction with a shorter statute. The District Court granted respondent's summary judgment motion, citing language in *Van Dusen v. Barrack, supra* that held open the possibility of not applying the law of the transferor state if the plaintiff, as opposed to the defendant, seeks transfer under 1404(a).[2] The Court of Appeals sustained the summary judgment ruling but did so on Constitutional grounds. It held, purportedly following *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), that where an action had insufficient contacts with a forum, the application of the forum state's statute of limitations violated the due process and full faith and credit clauses of the Constitution. The Court of Appeals found support in a footnote in *Van Dusen v. Barrack, supra*, which reads:

> We do not suggest that the application of transferor state law is free from constitutional limitations. See, e.g., Watson

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2. The Court stated in *Van Dusen v. Barrack, supra*:

> In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee state. *We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a).* [Emphasis supplied].

Id., at 639-640.

Contrary to *Van Dusen v. Barrack*, the Court of Appeals for the Third Circuit rejected application of the Mississippi statute even when the defendant moves for transfer.

v. Employers Liability Insurance Corp., LTD, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74; Hughes v. Fetter, 341 U.S. 609, 71 S.Ct., 95 L.Ed. 1212; Pacific Employers Ins. Co. v. Industrial Accident Comm'n, etc., 306 U.S. 493, 59 S.Ct. 629, 83 L. Ed. 940; Alaska Packers Assn. v. Industrial Accident Comm'm, etc., 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044; Home Ins. Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926.

Id., at 639, n. 41.

The Honorable Collin J. Seitz strongly dissented. Judge Seitz argued that the majority ignored the distinction between the Constitutional limitations on a forum's choice of substantive law, which governs conduct, and a forum's application of its procedural law. *Allstate Insurance Co. v. Hague*, *supra* and the Court of Appeal's other main support, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), explicitly apply the Constitution only to a forum's choice of substantive law. Judge Seitz also observed that this Court has declined to decide whether a forum's choice of its statute of limitations could rise to a due process violation.[3] The Court of Appeals took what might be called an "activist" position, elevating to a Constitutionally mandated rule what is properly a legislative matter.[4]

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3. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10 (1984), the Court stated:

> Under traditional choice-of-law principles, the law of the forum State governs on matters of procedure. In New Hampshire, statutes of limitations are considered procedural. There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and litigation. But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation. [Citations omitted.]

As in New Hampshire, Mississippi statutes are considered procedural. *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975). *Schreiber v. Allis-Chalmers Corp.*, 611 F. 2d 790 (10th Cir. 1979); *Davis v. National Gypsum*, 743 F. 2d 1132 (5th Cir. 1984); *Fieldman v. Roper Corp.*, 586 F. Supp. 936 (S.D. Miss. 1977); *Ramsay v. Boeing Co.*, 432 F. 2d 593 (5th Cir. 1970); *Cummings v. Cowan*, 300 F. Supp. 1251 (N.D. Miss. 1975); *Hyde Construction Co. v. Koehring Co.*, 387 F. Supp. 702 (S.D. Miss. 1974).

4. The Court of Appeals reached its decision sua sponte.

REASONS FOR GRANTING THE WRIT

A.

The decision of the Third Circuit Court of Appeals is in conflict with the decisions of other federal appellate courts. The Court of Appeals for the Fifth Circuit explicitly held in *Cowan I*, *supra* at 107, in conformity with Judge Seitz's dissent in the instant case, that application of Mississippi's six-year statute, being procedural, does not violate the due process and full faith and credit clauses as interpreted by *Home Insurance Co. v. Dick*, *supra* and *Allstate Insurance Co. v. Hague*, *supra*. In *Cowan*, the accident occurred in Texas, where the plaintiff and her deceased, injured husband were residents. The defendant, like the instant defendant, was not a Mississippi resident but conducted business in Mississippi and appointed an agent for service of process in Mississippi. The Court of Appeals for the Fifth Circuit further held in *Cowan II*, *supra* that, upon transfer pursuant 28 U.S.C. 1404(a), the Mississippi statute of limitations would apply. The Fifth Circuit affirmed that decision in *Cowan III*, *supra* after certifying to the Mississippi Supreme Court the question of whether Mississippi's "borrowing statute," Miss. Code Ann. §15-1-65 (1972), would bar the plaintiff's suit.[5] The Court of Appeals for the Fifth Circuit also held in *Loughan v. Firestone Tire and Rubber Co.*, 624 F.2d 726 (5th Cir. 1980) that the initial forum's longer statute of limitations will apply following transfer under 28 U.S.C. §1404(a). In that case, the suit was originally filed in Ohio, where the defendant maintained its principal place of business. The tort occurred in Florida, where plaintiff was also a resident, where he was employed, and where he received medical treatment. The case was transferred to Florida, where the Court of Appeals ultimately held that the Ohio statute applied.

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5. The Mississippi Supreme Court opinion, appended to the published opinion of *Cowan III*, indicates that the borrowing statute is not to be interpreted to require application of a foreign state's statute of limitations under the facts of *Cowan* or the instant case. See also *Louisiana & Mississippi R. Transfer Co. v. Long*, *supra*.

Similarly, the United States Court of Appeals for the Eleventh Circuit recently held in *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987) that the longer Mississippi statute would apply following a transfer under 27 U.S.C. §1404(a) to federal court in Florida. The United States Court of Appeals for the Tenth Circuit held likewise in *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979) following transfer to federal court in Kansas. Plaintiff in that case was a resident of Kansas and was injured while working for the defendant in Kansas. The defendant was licensed to do business in Mississippi and had a manufacturing plant in Mississippi. The issue of whether the statute of limitations can follow an action transferred under 28 U.S.C. 1404(a) without violating the Constitution is also on appeal in the United States Court of Appeals for the Fourth Circuit in *Goad v. Celotex Corp., et. al.* No. 86-3540.

The conflict created by the decision of the Court of Appeals for the Third Circuit raises significant problems within the federal court system. The Third Circuit, while holding that a Mississippi Court's application of the Mississippi statute is unconstitutional unless there is something more than the minimal contacts necessary for jurisdiction, is not a binding authority for either Mississippi state or federal courts. When a case identical to the instant case is filed in Mississippi, the Mississippi courts will apply the Mississippi statute of limitations and not follow the Third Circuit. Indeed, the Fifth Circuit Court of Appeals, which is binding authority for Mississippi federal courts, is in direct conflict with the Third Circuit Court of Appeals. *Cowan I* at 107.[6] If a motion to transfer under 28 U.S.C. 1404(a) is filed, Mississippi courts will deny the motion or transfer only to district courts in the Fifth, Eleventh, or Tenth Circuits.[7] If a Mississippi court does indeed transfer a

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6. The intent of Mississippi courts to apply the six-year Mississippi statute is also evident in the Mississippi transfer orders, which direct the transferee forum to apply the six-year statute. See, for example, the transfer order appended hereto at A-35.

7. The *Cowan II* court observed that transfer under 28 U.S.C. 1404(a) superceeded the common law forum non conveniens doctrine of dismissal. The

case to a district court within the Third Circuit, the outcome will be inconsistent with the outcome of identical cases transferred to the Fifth, the Eleventh, the Tenth, and possibly other Circuits. The problem, moreover, is not confined only to cases initially filed in Mississippi, but involves cases filed in any state where plaintiffs can enjoy the benefit of a relatively long statute of limitations. This conflict among the circuits undermines the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1934), whereby a federal court sitting in diversity must apply the law of a forum state in order to achieve the same result as the state court. It also undermines the objective of uniformity within the federal system in that transferee courts will be treating identical cases differently from transferor federal courts.

B.

The Court of Appeals decision, in addition to creating a conflict within the circuits, is inconsistent with a line of cases in this Court holding that the statute of limitations is set by the forum. As long ago as *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839), this Court stated that it was "well settled" that statutes of limitations were a matter of remedy "and consequently that the lex fori must prevail." The Court reasoned that a statute of limitations:

> is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

Although the fourteenth amendment due process clause, unlike article IV's full faith and credit clause, was not part of the

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common law doctrine was replaced, being overly harsh. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). The ruling of the Court of Appeals for the Third Circuit would have the effect of reinstating the common law doctrine. Once a case was transferred to the Third Circuit on forum non conveniens grounds, it would be dismissed.

Constitution at the time of *M'Elmoyle*, the rule has been consistently accepted since adoption of the amendment.

For example, in *Great Western Tel. Co. v. Purdy*, 162 U.S. 329, 339 (1869), the Court, citing *M'Elmoyle*, stated:

> The limitations of actions is governed by the lex fori, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.

In *Home Insurance Co., v. Dick, supra*, which the Court of Appeals for the Third Circuit misconstrued, this Court noted that "in the absence of contractual provisions, the local statute of limitations may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." In *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 607-09 (1947), this Court again recognized that the rule was "well established" and Constitutional. In *Wells v. Simonds Abrasive Co.*, 364 U.S. 514, 516-17 (1953), the Court several times reaffirmed its prior approval of "the well-established rule that the forum state is permitted to apply its own period of limitations." The rule that a forum state's limitations statute applies has been long recognized and should not be deemed offensive to the concepts of federalism and fairness that the two Constitutional provisions at issue protect.[8]

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8. Statutes of limitations are traditionally matters of policy established by the legislature after weighing the state's interest in eliminating stale claims and the interest in repose against the interest in vindicating legal rights and responsibilities. Even if there are policy reasons for requiring a Pennsylvania resident injured in Pennsylvania who files in Mississippi to bring suit within the Pennsylvania limitations period, it does not follow that bringing suit within that period is Constitutionally mandated. Limiting the application of the Mississippi statute is a matter for legislatures, and there is no ground for a judicially established rule.

There is no fundamental right not to be sued after a certain limitation period. As the Court observed in *Chase Securities Corp. v. Donaldson*, 325 U.S 304, 314 (1945):

The ruling of the Court of Appeals for the Third Circuit runs contrary not only to this Court's prior decisions but also to its numerous decisions on personal jurisdiction. This Court has explained that one purpose of the minimum contracts requirement is protecting a defendant against the burden of litigating in a distant or inconvenient forum. *World-Wide Volkswagon Corp., v. Woodson*, 444 U.S. 286, 292-293 (1980). *Phillips Petrolem v. Shutts*, ___ U.S. ___, 105 S. Ct. 2965, 2973 (1989). The minimum contact requirement embodies a concern for reasonableness and fairness to defendants. *Id.* A corporation purposefully availing itself of the privilege of conducting activities within a state has clear notice that it is subject to suit there and can thereby alliviate the risk of litigation. *World-Wide Volkswagon Corp. v. Woodson*, *supra* at 198. This Court has sustained the exercise of jurisdiction over a foreign corporation no longer conducting any activities in the forum for a cause of action that did not arise in the forum. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1951). Thus, the Third Circuit has held that while there may be sufficient jurisdictional contacts — enough contacts to satisfy standards of fairness and reasonableness and to place a defendant on notice that he may be sued in a particular forum — the contacts could be insufficient to permit the forum state to apply its own procedural law. That due process could be satisfied for jurisdictional purposes but not for purposes of applying a forum state's procedural law is incongruous. If it does not offend due process for a corporation

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> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [citation omitted] They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. (footnote omitted.)

Chase Securities Corp., v. Donaldson, 325 U.S. at 314.

to be hailed into court in a state where it has a registered agent to accept service of process, it could not offend due process for that corporation to submit to the procedural rules, including the statute of limitations, of that state.

C.

The Court of Appeals decision is, finally, offensive to the full faith and credit clause and to state sovereignty. It has the effect of imposing the rules of a foreign jurisdiction on the courts and territory over which Mississippi, or another similarly situated state, is sovereign. Under the Court of Appeals' ruling, the sovereignty of each state is threatened to the extent that another jurisdiction has greater contacts with the cause of action or the defendant.[9] The Constitution has never before been interpreted to impose a choice of law principle on states whereby they must mold their judicial procedures to those of the state with the greatest contacts.[10] So long as a state is not attempting to

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9. The six-year statute of limitations has been accepted in Mississippi for over 150 years and has been repeatedly reaffirmed by the Mississippi legislature during that time. The Code section in question was first adopted in the year 1880. In 1880, the Code section number was 2669. The statute was re-enacted in the Codes of 1892 (§2737); 1906 (§3097); Hemmingway's 1917 (§2461); 1930 (§2292); 1942 (§722) and 1972 (§15-1-49).

Thus, the Mississippi legislature has repeatedly reenacted the statute, most recently in the laws of 1972. Its approval on April 26, 1972 post-dates the interpretation repeatedly placed upon this statute by Mississippi Courts.

The most recent attempt to change Miss. Code. Ann. §15-1-49 (1972) is reflected in House Bill 454 introduced in 1986. House Bill 454 was voted down by a substantial majority of the committee and not reported out of committee. A Senate Bill identical to the House Bill was also defeated.

That same bill has been introduced every year for the last several years and has been rejected by the legislature in each instance. So the legislature has not only re-adopted their statute as interpreted by courts for over 150 years (see *Hamilton v. Cooper*, 1 Miss. (Walker) 542 (1832)), but it has affirmatively refused to change it.

10. Instead, plaintiffs are expected to take advantage of favorable law in any proper jurisdiction, and corporate defendants are deemed to be cognizant of the laws of jurisdictions where they have minimum contacts. As this Court stated in *Keeton v. Hustler Magazine, Inc.*, *supra*:

Petitioner's successful search for a State with a lengthy statute of

regulate out-of-state conduct by its choice of *substantive* law in violation of the Constitution and so long as it has jurisdiction over the parties, full faith and credit does not require that it recognize another jurisdiction's procedure. Mississippi has made the policy decision to keep its courts open to a cause of action for a longer period than Pennsylvania, and so long as business entities commiting torts are subject to Mississippi's jurisdiction, Mississippi's limitations statute deserves the full faith and credit of states incorporating those business entities, states housing their headquarters, and states where plaintiffs are injured.[11]

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limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.

Id. at 780.

11. To the extent Pennsylvania wanted its two-year limitations period to apply to causes of action arising under its substantive law, its legislature could have conditioned the substantive right on bringing suit within two years as opposed to conditioning the remedy on filing within two years. Binding the limitations period to the underlying right would have caused the period to be treated as part of the substantive law and thus not subject to the forum's statute of limitations. *Davis v. Mills*, 194 U.S. 451, 453-454 (1904); *White v. Malone Properties, Inc.*, 494 So.2d 576 (Miss. 1986); *Fieldman v. Roper*, 586 F. Supp. 936, 938 (S.D. Miss. 1977); *Cummings v. Cowan*, 300 F. Supp. 1251, (N.D. Miss 1975). The Pennsylvania legislature chose not to frame its statute in this way.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered on July 9, 1987.

Respectfully Submitted,

Arnold Levin
Counsel of Record
David J. Perlman
LEVIN & FISHBEIN
320 Walnut Street
Suite 600
Philadelphia, PA 19106
(215) 592-1500

AND

Stanley V. Ostrow
FINKEL, LEFKOWITZ, OSTROW
& WOOLRIDGE
800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

ATTORNEYS FOR PETITIONERS

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

(D.C. Civil No. 85-2725)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Argued: March 5, 1987
Before: GIBBONS, *Chief Judge* and SEITZ
and ALDISERT, *Circuit Judges*

(Opinion Filed: May 28, 1987)

STANELY V. OSTROW, ESQ. (Argued)
WILLIAM A. PENROD, ESQ.
FINKEL LEFKOWITZ OSTROW
& WOOLRIDGE
800 Commonwealth Building
Pittsburgh, PA 15222

Attorneys for Appellants

GARY F. SHARLOCK, ESQ.
DAVID P. HELWIG, ESQ. (Argued)
SHARLOCK, REPCHECK & MAHLER
1110 Two Chatham Center
Pittsburgh, PA 15219

Attorneys for Appellee

OPINION OF THE COURT

GIBBONS, *Chief Judge:*

Albert J. Ferens and Margaret L. Ferens appeal from a summary judgment which was entered in favor of defendant, Deere & Company (Deere), in their product liability action grounded in diversity. The district court held that the action was time barred by Pennsylvania's two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524 (2) (Purdon 1981). Because their action was transferred pursuant to 28 U.S.C. § 1404(a)(1982), from the Southern District of Mississippi to the Western District of Pennsylvania, the Ferenses contend that the governing time limitation is Mississippi's six-year statute of limitations for personal injuries. *See* Miss. Code Ann. § 15-1-49 (1972). We affirm.

I.

The Ferenses reside in Dunbar, Fayette County, Pennsylvania. In July, 1981 Mr. Ferens purchased for use on his farm a John Deere Sidehill No. 6620 combine from the Uniontown Farm Equipment Company in Uniontown, Washington County, Pennsylvania. The combine was manufactured and distributed by Deere, a Delaware corporation with its principal place of business in Moline, Illinois and had been sold by Deere to Uniontown for resale. On July 5, 1982, in Washington County, Pennsylvania, while Mr. Ferens was cleaning the combine, his right hand became enmeshed in its rotating augur and was severed above the wrist.

On July 3, 1985 the Ferenses filed Civil Action No. 85-1534 in the Western District of Pennsylvania, alleging that Deere breached certain express and implied warranties of merchantability and fitness for use, in violation of the Pennsylvania Commercial Code. *See* 13 Pa. Cons. Stat. Ann. §§ 1101-9507 (Purdon 1984). This breach of warranty action, which is still pending, seeks compensation for Mr. Ferens' personal injuries. Under Pennsylvania law, a four-year statute of limitations governs actions for breach of warranty. *See* 13 Pa. Cons. Stat. Ann. § 2725 (Purdon 1984); 42 Pa. Cons. Stat. Ann. § 5525 (Purdon 1981).

On July 25, 1985 the Ferenses also filed Civil Action No. 85-2725 in the Southern District of Mississippi, Jackson Division, seeking identical damages as those sought in Pennsylvania for the same personal injuries suffered in the July 5, 1982 accident. In the Mississippi action, recovery was based on theories of negligence and strict liability in tort. Specifically, the Ferenses claimed that the combine was defective and that Deere failed to warn of the defects. The Ferenses chose Mississippi because Deere

was qualified to do business there, having had appointed a local registered agent, as it had in many other states, and because the Mississippi statute of limitations for personal injuries is six years.[1] *See* Miss. Code Ann. § 15-1-49 (1972). The Ferenses did not allege that Deere designed or manufactured the combine in Mississippi, or that they ever set foot in that state.

After Deere filed an answer in the Mississippi action, the Ferenses made a motion, pursuant to 28 U.S.C. § 1404(a), to transfer their case to the Western District of Pennsylvania, claiming, *inter alia*, a) that they resided in Pennsylvania; b) that the accident occurred in Pennsylvania; c) that their claim had no connection with Mississippi; d) that a substantial number of material witnesses resided in the Western District of Pennsylvania, while none were in Mississippi; e) that a substantial number of necessary documentary exhibits were in the Western District of Pennsylvania, while none were in Mississippi; and f) that the breach of warranty action pending in the Western District of Pennsylvania, involving the same accident, presented common questions of fact and law. On November 8, 1985, the transfer motion was granted and on November 21, 1985 the breach of warranty action and the negligence and strict liability action were consolidated for all purposes.

On February 20, 1986, Deere made a motion for summary judgment on all claims, asserting that the Pennsylvania statute of limitations barred the negligence and strict liability claims, and that the terms of its written warranty precluded the breach of

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[1]Pennsylvania has a two-year statute of limitations for personal injuries, 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) which had run when this action was filed three years after the accident occurred.

warranty claims. The district court held that, despite the fact that the negligence and strict liability action had been transferred from Mississippi, it was governed by the Pennsylvania statute of limitations. Additionally, the court held that material fact issues prevented summary judgment in the breach of warranty action. Thus, summary judgment was entered on the negligence and strict liability claims, and the court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). This appeal followed. The breach of warranty case has been stayed pending its resolution.

II.

The Ferenses' position is straightforward. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), federal district courts sitting in diversity must apply the choice-of-law rule of the state in which they sit. Moreover, under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), when a diversity action is transferred from one federal district court to another, the transfer does not result in the application of a new choice-of-law rule. Thus, the Ferenses urge, the District Court for the Western District of Pennsylvania was obliged to apply Mississippi's choice-of-law rule with respect to the statute of limitations governing personal injury cases. The Ferenses insist that Mississippi in this case would apply its own statute of limitations, and that therefore the Western District of Pennsylvania must do likewise.

The issue presented in the instant appeal, however, is not as facile as the Ferenses would have us believe. Their arguments ignore the constitutional limits imposed upon the application of transferor state law. Thus, we begin with an examination of Mississippi law, which is aberrational in two respects.

First, Mississippi has adopted a highly unusual six-year statute of limitations for personal injury actions,[2] whereas most states have two-or three-year statutes of limitations for such claims. Second, the Mississippi Supreme Court has made an exceptionally uncommon interpretation of its borrowing statute. Like most jurisdictions in the United States, Mississippi has adopted a borrowing statute with respect to time limitations on actions.[3] The Mississippi version provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss. Code Ann. § 15-1-65 (1972).

On its face, Mississippi's borrowing statute would seem to suggest that Mississippi would look to Pennsylvania for the limitations period governing the Ferenses negligence and strict liability claims since

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[2]Only five states have six-year statutes of limitations for personal injury claims. *See* Me. Rev. Stat. Ann. tit. 14, § 752 (1964); Minn. Stat. § 541.05 (Supp. 1987); Miss. Code Ann. § 15-1-49 (1972); N.D. Cent. Code § 28-01-16 (1974); S.C. Code Ann. § 15-3-530 (Law Co-op 1977).

[3]Pennsylvania borrowing statute, for example, provides:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim.

42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981).

those claims would be time barred in Pennsylvania. Relying on the clause "where the defendant has resided before he resided in this state," however, the Mississippi Supreme Court has held that its borrowing statute "only applies where a non-resident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 667, 131 So. 84, 88 (1930); *see also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983) (applying the Mississippi Supreme Court's interpretation of § 15-1-65). Because Deere was qualified to do business in Mississippi at the time this action accrued, it would be treated as a resident of Mississippi under Mississippi law. *See Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir. 1969). Thus, the Ferenses argue that because the Mississippi borrowing statute is inapplicable, Mississippi would apply its own statute of limitations, and under *Klaxon* and *Barrack* the federal courts must do likewise.

Oddly, the one federal appellate court which has confronted the anomaly of applying a Mississippi statute of limitations to an action having no nexus with that state, *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), has applied *Klaxon* and *Barrack* in the manner which the Ferenses urge. In *Schreiber*, a Kansas plaintiff was injured in Kansas by a product manufactured by a Delaware corporation with its principal place of business in Wisconsin. After the expiration of the Kansas statute of limitations but before the expiration of the Mississippi statute, the Kansas plaintiff sued in the federal district court in Mississippi, which thereafter transferred the action, pursuant to 28 U.S.C. § 1404(a), to a federal district court in Kansas. The federal district court in Kansas refused to apply the Mississippi statute of limitations.

See 448 F. Supp. 1079 (D. Kan. 1978). The Court of Appeals for the Tenth Circuit, however, reversed, holding that *Van Dusen v. Barrack* controlled and that the Mississippi statute of limitations applied.

Although *Schreiber v. Allis-Chalmers Corp.* is precisely on point,[4] , it has been severely criticized. *See* E. Scoles & P. Hay, *Conflict of Laws* 132 (1984); Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L.J. 1, 56-65. We agree with the critics that at most, *Klaxon* and *Barrack* require a federal diversity forum to apply a state choice-of-law rule which the state court could, as a matter of federal law, lawfully apply. Indeed, the *Van Dusen v. Barrack* Court expressly acknowledged as much. The Court, in rejecting the contention that a section 1404(a) transfer would result in a prejudicial change of law, observed:

> In so ruling, however, we do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee State.[41]
>
> 41. We do not suggest that the application of transferor state law is free from constitutional limitations. *See, e.g., Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66;

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[4]While Deere points out that in *Barrack* and in *Schreiber* the transfer motions were made by defendants, *see Barrack*, 376 U.S. at 614; *Schreiber*, 611 F.2d at 791, and that in the instant appeal the section 1404(a) motion was made by the plaintiff, *see* 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure, § 3846 (2d ed. 1986), our decision today does not depend on this distinction.

> *Hughes v. Fetter*, 341 U.S. 609; *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493; *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532; *Home Ins. Co. v. Dick*, 281 U.S. 397.

Van Dusen v. Barrack, 376 U.S. at 639. Thus, the *Barrack* Court reasserted the continuing authority of those cases which, under the due process and full faith and credit clauses, have established federal limits upon aberrational state choice-of-law rules.

Moreover, the *Barrack* Court's reference to *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), is for present purposes particularly significant. *Dick* involved a Texas state court applying Texas law to avoid the application of a contract term that barred any action on the insurance policy commenced after one year. The policy had been issued in Mexico to a Mexican citizen, covering a Mexican risk, and a Mexican loss had in fact occurred. The contract term in question was valid under Mexican law. The *Dick* court held that by applying its own longer limitation of actions policy instead of that of the jurisdiction having more significant contacts with the occurrence (Mexico), Texas violated the due process clause. *See Dick*, 281 U.S. at 408; *see also Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (Mississippi courts cannot void limitation of action provision in Tennessee insurance policy).

Although both *Dick* and *Delta & Pine Land Co.* involved contracts incorporating shorter limitations than those authorized by the governing state law, those holdings are not limited to contractual situations. As Justice Brennan explained in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 310-11 (1981):

> *Dick* and [*John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936)] stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. *Dick* concluded that nominal residence -- standing alone -- is inadequate; *Yates* held that postoccurrence change of residence to the forum State -- standing alone -- was insufficient to justify application of forum law.

All the cases decided by the Supreme Court after *Dick* which permitted the application of forum law over due process of full faith and credit objections involved situations in which the forum state had some contact with the case and some interest by virtue of that contact, justifying the application of the forum state's law. *See Hague*, 449 U.S. at 312-13; Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980).

The instant appeal presents the precise situation to which Justice Brennan refers in *Hague* -- nominal residence, standing alone. Deere is nominally a resident of Mississippi because, in order to do business there, it has appointed a local resident agent. The lawsuit does not grow out of any business which Deere conducted in Mississippi. Mississippi has no interest in the injuries sustained by Mr. Ferens, or in the transaction by which he acquired the combine that injured him. Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional. *See Hague*, 449 U.S. at 312-13.

III.

Consequently, because Mississippi could not apply its own law to the Ferenses' suit against Deere if the suit were pending in a Mississippi state court, neither *Klaxon* nor *Barrack* require that a federal diversity forum do so either. Conversely, since the Ferenses are Pennsylvania residents, the injury occurred in Pennsylvania, and the combine was acquired there, Pennsylvania has substantial contacts with the occurrence, thereby rendering the application of its law neither arbitrary nor fundamentally unfair.[5] Hence, the district court did not err in rejecting the applicability of the Mississippi statute of limitations.

The judgment appealed from will therefore be affirmed.

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[5]Because we hold that Mississippi could not constitutionally apply its law in this case, we have no reason to consider whether, as Deere contends, the *Van Dusen v. Barrack* rule applies only when a defendant makes a section 1404(a) motion. *See* note 4 *supra*.

Seitz, *Circuit Judge*, dissenting.

It is hardly original to say that hard cases make bad law. Depending on one's perspective, this case involves either skillful lawyering within established rules to obtain favorable law or unfair forum-shopping. The majority, in my view, has unwarrantedly imposed constitutional limitations on a forum's choice of law to prevent the Ferenses from gaining an advantage under the provisions of 28 U.S.C. § 1404(a).

The majority holds that it would be unconstitutional for a Mississippi state court to apply its statute of limitations in this case. In so holding, it ignores the distinction between the constitutional limitations on a forum's choice of substantive law and a forum's application of its procedural law.

The forum has traditionally applied its state's statute of limitations, regardless of what state's substantive law controlled. *See Keeton v. Hustler Magazine, Inc.*, *465 U.S. 770, 778 n.10 (1984)*; *Scudder v. Union National Bank*, 91 U.S. (1 Otto) 406 (1875); *Ross v. Johns-Manville Corp.*, 766 F.2d 823 (3d Cir. 1985); *Loughan v. Firestone Tire & Rubber Co.*, 624 F.2d 726 (5th Cir. 1980); Restatement (Second) of Conflict of Laws § 142(2)(1971). Although most states have enacted borrowing statutes to address the problem presented in this case, I am not persuaded that this choice-of-law approach is mandated by the Constitution.

The majority opinion fails to cite any cases supporting its position that a forum's application of its statute of limitations may violate the due process clause of the Constitution. The two Supreme Court cases relied on by the majority, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), address only the constitutional limits on a forum's choice of substantive

law. In *Hague*, Justice Brennan stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13. Moreover, the Court in *Dick* distinguished the case before it, which involved an attempt to apply Texas substantive law to a contractual limitation on the period in which the parties could sue, from a case in which the forum simply applied its procedural statute of limitations. 281 U.S. at 409-10.

In the absence of any Supreme Court decision disavowing the traditional rule permitting a state to apply its own statute of limitations,[1] I conclude that a Mississippi court's application of its six-year statute of limitations in cases such as the one before us would not violate due process. *See Cowan v. Ford Motor Co.*, 694 F.2d 104, 107 (5th Cir. 1982)(rejecting the contention that *Hague* and *Dick* limit Mississippi's selection of its statute of limitations).

Because I believe a Mississippi court could apply its statute of limitations in this case, I turn now to the issue whether the district court erred in applying Pennsylvania's statute of limitations to the Ferenses' tort claim. The parties agree that the Mississippi state courts would apply its six year statute of limitations in this case. *See Cowan v. Ford Motor Co.*, 719 F.2d 787 (5th Cir. 1983); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930). They also agree that under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the federal

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[1]In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984), the Court refused to reach the question whether the traditional choice of law rule, permitting a forum to select its statute of limitations, was limited by the due process clause.

district court in which this case was originally filed was bound to apply Mississippi's choice-of-law rules, and hence, its statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court held that the law of the transferor state should be applied when a defendant moves for a transfer under section 1404(a). It based this holding on two grounds. First, it stated that its holding would prevent the defendant from using section 1404(a) as a forum-shopping device. 376 U.S. at 633-636. Second, the Court concluded that under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1934), section 1404(a) should be interpreted to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638. The *Barrack* Court explicitly reserved the question whether the same rule should apply in cases in which the plaintiff initiated the transfer. A number of courts of appeals, however, have held that the law of the transfer state should govern regardless of which party moved for transfer if the transferor court is a proper forum in terms of venue and personal jurisdiction. *See Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir. 1984); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983); *Martin v. Stokes*, 623 F.2d 469, 471-73 (6th Cir. 1980).

By focusing on whether the transferor court was a permissible forum rather than the identity of the party seeking the transfer, the courts have prevented improper forum-shopping by denying plaintiffs the ability to obtain advantageous state law in fora in which they could not properly maintain an action. At the same time, deciding the choice of law issue on the basis of the propriety of the plaintiff's initial forum selection complies with the requirement in *Barrack*

that a transfer from a proper forum does not "achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638.

In this case, there is no dispute that this case could be brought in the federal district court for the southern district of Mississippi in terms of venue and personal jurisdiction over the defendant. Because *Barrack* and the *Erie* doctrine require courts to treat a transfer under such circumstances as "just a change of courtrooms," *Martin v. Stokes, supra*, 623 F.2d at 472, the Mississippi statute of limitations should have been applied to the Ferenses' tort action.

The district court based its decision to apply the transferee's law on the ground that plaintiffs must demonstrate some good faith intent to proceed in the court where the action was originally filed before they can obtain the advantages of the transferor's law. Because it believed that the Ferenses had no intention of proceeding in the Mississippi federal district court, the court applied Pennsylvania's statute of limitations to the tort action.

This factual inquiry into the plaintiff's motives, however, is not justified under section 1404(a). Section 1404(a) permits both plaintiffs and defendants to initiate transfers "for the convenience of the parties." Moreover, as noted above, compliance with the *Barrack* language dictates that the law of the transferor state govern when the transferor court is a permissible forum.

There may be, as the appellees urge, good reasons to prevent clever plaintiffs from taking advantage of the transfer provisions in the way the Ferenses did in this case. Whether there should be restrictions on plaintiff-initiated transfers under section 1404(a), however, is an issue that is best left to Congress.

Federal courts should not "establish and impose upon state courts a federal choice-of-law rule." *Allstate Insurance Co. v. Hague, supra*, 449 U.S. at 334 (Stevens, J., concurring). As a federal court sitting in diversity, the district court of the southern district of Mississippi was bound to apply Mississippi's six-year statute of limitations. To be consistent with both *Erie* and *Barrack*, the transferee court should have applied the Mississippi statute of limitations to the Ferenses' tort action. I would therefore reverse the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

DEERE & COMPANY, Defendant.

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

JOHN DEERE COMPANY, a/k/a Deere & Company, Defendant.

Civ. A. Nos. 85-1534, 85-2725.

United States District Court, W.D. Pennsylvania.

July 25, 1986.

Stanley V. Ostrow, William A. Penrod, Pittsburgh, Pa., Faye Murphree James, William R. Barnett, Jackson, Miss., for plaintiffs.

Gary J. Sharlock, Sharlock, Repcheck & Mahler, Pittsburgh, Pa., for defendant.

OPINION

COHILL, Chief Judge.

Presently before the Court is defendant's Motion for Summary Judgment in the above-captioned cases. Diversity jurisdiction is proper pursuant to 28 U.S.C. §1332 (1982).

Summary of Facts and Procedural History

Plaintiffs, Albert J. Ferens and Margaret L. Ferens, reside in Dunbar, Fayette County, Pennsylvania. Defendant, Deere & Co., is a Delaware corporation with its principal place of business in Moline, Illinois. Defendant Company is in the

business of manufacturing, advertising, selling and distributing combines, which are used to thresh and clean grain.

On or about July 17, 1981, Plaintiff purchased a John Deere Sidehill #6620 Combine, Serial No. 454907, which was manufactured by Defendant. Complaint, ¶4. Defendant sold the combine in question to the Uniontown Farm Equipment Company, which company thereafter sold the combine to Plaintiff for use on his farm. *Id.*, ¶6.

On or about July 5, 1982, in Washington County, Pennsylvania, while Plaintiff was cleaning the combine, his right hand was pulled into the rotating auger, thereby amputating it above the wrist. *Id.*, ¶7.

On July 3, 1985, Plaintiffs filed C.A. 85-1534 in the Western District of Pennsylvania, basing their claim on the Pennsylvania Commercial Code, 13 Pa.C.S. §§1101-9507 (Purdon 1984). Specifically, Plaintiffs alleged that the combine was expressly and/or impliedly warranted by Defendant to be merchantable and fit for the ordinary purposes for which it was used, and that Defendant breached its express and/or implied warranties since the combine was, in fact, defective.

Subsequently, on July 25, 1985, Plaintiffs filed C.A. 85-2725 in the Southern District of Mississippi, Jackson Division. That action, which was founded on the same accident whereby Plaintiff lost his right hand, sought damages which were identical to those sought in Plaintiffs' initial action; however, recovery was based on theories of negligence and strict liability under §402A and B of the Restatement (2d) of Torts. In their complaint in the subsequent action, Plaintiffs alleged that the combine was defective in and of itself, and as a result of Defendant's failure to warn of the alleged defects.

In a rather unusual procedural move, Plaintiffs then filed a motion for change of venue of the Mississippi action under 28 U.S.C. §1404(a). Plaintiffs' motion was granted on November 8, 1985 by United States Magistrate John R. Countiss, III of the Southern District of Mississippi, Jackson Division, who transferred Plaintiffs' second action to the Western District of

Pennsylvania. Thereafter, by Order of this Court dated November 21, 1985, the two lawsuits were consolidated for all purposes.

Summary Judgment

Defendant has filed this Motion for Summary Judgment on the grounds that 1) the purchase order disclaimed any implied warranties of merchantability and fitness for a particular purpose, and contained an exclusion of consequential damages; and 2) Pennsylvania's two-year limitations period bars Plaintiffs' negligence and strict liability claims.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.26; *Anderson v. Liberty Lobby Inc.*, ____ U.S. ____, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of proving that no genuine issue exists, *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and any doubts must be resolved in favor of the nonmoving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.1985) (quoting *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir.1981)).

The United States Supreme Court has recently stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . ." *Celotex Corp. v. Catrett*, ____ U.S. ____, 106 S.Ct. 2548, ____, 91 L.Ed.2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 106 S.Ct. at 2510.

Here, the motion is made by the Defendant solely on the basis of the pleadings without supporting affidavits; thus, the motion is functionally equivalent to a motion for judgment on

the pleadings under Fed.R.Civ.P. 12(c). *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 273 (2d Cir.1968), quoting 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.02[3], at 2035. As such, all well-pleaded factual allegations of the Plaintiffs must be taken as true and all allegations of the moving party which have been denied are taken as false; conclusions of law are not deemed admitted. *Shade v. Commonwealth of Pennsylvania Dept. of Transportation*, 394 F.Supp. 1237, 1243 (M.D.Pa.1975).

I. *Disclaimer of Warranties*

Defendant claims that the purchase order conspicuously included the warranties which accompanied the sale of the combine and that it disclaimed the implied warranties of merchantability and fitness for particular purpose. In addition, Defendant emphasizes that said purchase order contained a clause excluding consequential damages. Defendant's Answer, Exhibit "A."

Plaintiffs admitted to the authenticity of the purchase order in their Reply to Defendant's Answer; however, Plaintiffs contend that the terms of the purchase order are unconscionable, amount to a contract of adhesion and are against public policy.

Under its adoption of the Uniform Commercial Code, 13 Pa.ClS. §2316 provides that warranties may be excluded or modified at the time of sale:

> §2316. Exclusion or modification of warranties
>
> . . . . .
>
> (b) Implied warranties of merchantability and fitness.—Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify an implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .
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> (c) Implied warranties in general.—Notwithstanding subsection (b):

(1) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which is common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty.

(2) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

(3) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

. . . . . .

Id. See Thermo King Corp. v. Strick Corp., 467 F.Supp. 75 (W.D.Pa.), *aff'd*, 609 F.2d 503 (3rd Cir.1979) (manufacturer's warranty card contained "conspicuous" language to exclude implied warranties).

In the present case, the purchase order provided as follows:

> The Warranty on the reverse side is a part of this contract and the following applies where permitted by law: Neither seller, John Deere Company, nor the manufacturer makes any other representations or warranties, express or implied (AND EXPRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS) or has any obligation to the Purchaser except as priovided on the reverse side.

Defendant's Answer, Exhibit "A."

On the reverse side of this purchase order, in paragraph F, the disclaimer is again set forth:

F. NO REPRESENTATION OR IMPLIED WARRANTY.

Where permitted by law, neither John Deere nor any company affiliated with it makes any warranties, representations or promises, express or implied, as to the quality or performance of its products other than those set forth above and DOES NOT MAKE ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS.

Id.

Paragraph G on the reverse side added:

G. REMEDIES EXCLUSIVE.

The only remedies the purchaser has in connection with the breach or performance of any warranty on John Deere equipment are those set forth above. In no event will the dealer, John Deere or any company affiliated with John Deere be liable for incidental or consequential damages or injuries, including, but not limited to loss of crops, loss of profits, rental or substitute equipment or other commercial loss.

In its definition of consequential damages, 13 Pa. C.S. §2715(b)(2) provides:

(b) Consequential damages.—Consequential damages resulting from the breach of the seller include:

(2) injury to person or property proximately resulting from any breach of warranty.

Id.

Plaintiffs, in support of their argument that the disclaimer of warranties and exclusion of remedies provisions are unconscionable, rely on 13 Pa.C.S. §2719(c):

(c) Limitation of consequential damages.—Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer

goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Id.

Whether a contract or clause is unconscionable is a question of law for the court. *Bishop v. Washington*, 331 Pa.Super. 387, 399, 480 A.2d 1088, 1094 (1984). The relevant section on unconscionability, 13 Pa. C.S. §2302, provides:

> §2302. Unconscionable contract or clause
>
> (a) Finding and authority of court.—If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may:
>
> (1) refuse to enforce the contract;
>
> (2) enforce the remainder of the contract without the unconscionable clause; or
>
> (3) so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (b) Evidence by parties—When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Plaintiffs argue that the above language renders Defendant's motion premature since the parties have not presented evidence on the issue of unconscionability. We agree for the following reasons.

The Pennsylvania Supreme Court has adopted the following definition of unconscionability:

> Unconscionability has generally been recognized to include an *absence of meaningful choice* on the part of one of the parties together with contract *terms which are unreasonably favorable to the other party*.

Witmer v. Exxon Corp., 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981), quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965). In the *Williams* case, Judge Skelly Wright summarized the factors to be considered in determining whether a contract or clause is unconscionable or not:

> Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.
>
> In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."

Williams, 350 F.2d at 449-450 (footnote omitted).

In the present case, since no affidavits, interrogatories, depositions, or evidence of any sort has been submitted regarding the circumstances surrounding the transaction, we can only speculate as to whether or not the purchase order was unconscionable. Following the mandate of 13 Pa.C.S. §2302(b), we find it necessary to afford the parties a reasonable opportunity to present evidence on the "commercial setting, purpose and effect" of the disputed language in the purchase order. We note that while Plaintiff is a farmer, that alone is not indicative of his commercial standing because he may be a "small-time" farmer or he may be a large corporate farmer with thousands of acres of land. *See Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 224 (4th Cir.1982) (Hall, J., dissenting) ("while in its broadest sense the meaning of 'commercial' could include any activity intended to yield a profit, in common parlance the term is generally associated with manufacturing or retail activities").

Once we are presented with some evidence as to whether the transaction was of a commercial or consumer nature, prior dealings between the parties, customary practice within the industry etc., we will then be able to make a determination on the issue of unconscionability. As it currently exists, however, the record is barren on that matter. Thus, Defendant's reliance on *Beckman v. Vassall-Dillworth Lincoln Mercury, Inc.*, 321 Pa.Super. 428, 468 A.2d 784 (1983) for the proposition that summary judgment should be granted is misplaced, as there, the state court had the benefit of affidavits, deposition testimony and other evidence which enabled it to render a decision that the contract clause was not unconscionable. *Id.* at 439-40, 468 A.2d at 788.

Defendant also relies on *Thermo King Corp., supra*, where this Court found a similar warranty exclusion and limitation of remedy provision not to be unconscionable. However, *Thermo King* is not dispositive of this case because it indubitably involved a commercial transaction between two corporate parties. *Id.*, at 78. Moreover, unlike the situation in the case before us which involves injury to the person, *Thermo King* only involved consequential damages for the loss of $15,000 worth of cargo. *Id.* at 77. While the applicable provisions of the purchase

order here would most likely bar a claim for the loss of crops or profits resulting from a defective blade in the combine, we are not convinced that Plaintiff understood those provisions as limiting his right to bring a breach of warranty action for the loss of his hand. *Cf. Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146 (3d Cir.1974) (contract clause must clearly and unequivocally express intent necessary to exculpate defendant from negligence or strict liability claims).

Accordingly, we will deny Defendant's Motion for Summary Judgment on Plaintiff's breach of warranty claim without prejudice. Defendant may reassert said motion, if deemed necessary, once the record becomes fully developed as set forth above. *See Wobb v. Ford Motor Co.*, 76 F.R.D. 452, 458 (W.D.Pa.1977) (motion for summary judgment denied with respect to counts alleging unconscionability of dealer development arrangement since further discovery was necessary relative to motive and intent).

II. *Applicable Statute of Limitation for Plaintiffs' Tort Claims*

Our inquiry now turns to what statute of limitations governs Plaintiffs' negligence and strict liability claims. At the outset, we note that Pennsylvania has a two-year statute of limitations for injuries to the person, 42 Pa.C.S. §5524(2) (Purdon 1981), whereas Mississippi's limitation period is six years. Miss.Code Ann. §15-1-49 (1972).

As we noted earlier, Plaintiffs' tort actions were originally filed in the Southern District of Mississippi *after* Plaintiffs initiated their UCC breach of warranty claims in the Western District of Pennsylvania. Plaintiffs then transferred their tort actions from the Southern District of Mississippi to this Court pursuant to 28 U.S.C. §1404(a) which provides:

> For the convenience of the parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought.

Id.

In support of the transfer, Plaintiffs stressed the feasibility of consolidating their tort claims with their pending UCC claims in this District Court and raised concerns about the inconvenience and expense that would result if their second action remained in the Southern District of Mississippi. In his Affidavit In Support of Motion for Change of Venue, Albert J. Ferens admitted that:

> 6. The action against defendant, Deere & Company, in the Western District of Pennsylvania arises out of said accident which occurred on July 5, 1982, and is based on provisions of the Uniform Commercial Code.
>
> 7. The basis of the action filed against Defendant in the Southern District of Mississippi was the aforesaid July 5, 1982 accident and is based on strict liability, negligence and breach of warranty by said defendant.
>
> 8. That all witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania.
>
> 9. That all documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania.
>
> 10. That to simultaneously pursue the Pennsylvania and Mississippi actions as separate lawsuits would be a great cost and expense to him.

Id., ¶¶6-10.

In the instant case, both parties concede that statutes of limitations are procedural and that the applicable limitation period is to be provided by the law of the forum. *See Butler v. Dravo Corp.*, 310 F.Supp. 1265 (W.D.Pa.1970); *Vick v. Cochran*, 316 So.2d 242 (Miss.1975). To prevent forum shopping and to keep lawsuits in forums which have a significant nexus and a legitimate interest in the litigation, most jurisdictions, including Pennsylvania and Mississippi, have adopted "borrowing statutes." In essence, borrowing statutes adopt as the

applicable period of limitation the statute which would have applied in the jurisdiction where the claim arose. For instance, Pennsylvania's borrowing statute provides that:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, which ever first bars the claim.

42 Pa.C.S. §5521.

However, the crux of the problem in the instant case stems from Mississippi's anomalous borrowing statute which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country *where the defendant has resided before he resided in this state*, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss.Code Ann. §15-1-65 (1972) (emphasis added). The Mississippi Supreme Court, relying on the highlighted language above, has held that this borrowing statute "only applies where a nonresident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84, 88 (1930). *See also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir.1983) (applied Mississippi Supreme Court's interpretation of that state's borrowing statute). Since Defendant was registered to do business in Mississippi at the time of the accident here, Defendant would be treated as a resident under Mississippi law. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir.1969). Relying on Mississippi's borrowing statute, Plaintiffs contend that the 6-year limitation of that forum should be applied.

We now reach the threshold question of whether the law of the transferor forum or the transferee forum should be applied. In resolving this question, we must consider whether Plaintiffs can utilize the change of venue provisions of 28 U.S.C. §1404(a) to resurrect a time-barred claim in the more convenient forum.

In *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), the Supreme Court held that "where defendants seek transfer, the transferee district court must be obligated to apply the state law that would have applied if there had been no change of venue." *Id.* at 639, 84 S.Ct. at 821, 11 L.Ed. at 962. The *Van Dusen* Court pointed out that "both the history and purpose of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of court rooms." *Id.* at 636, 84 at 819, 11 L.Ed.2d at 916. The Court stressed that §1404(a) should not be used as a device by defendants to undermine the plaintiff's privilege of selecting "a forum which, although it was inconvenient, was a proper venue." *Id.* at 634, 84 S.Ct. t 818, 11 L.Ed.2d at 960. Moreover, the Court noted that if a change of law were concomitant with transfer, §1404(a) would become a forum shopping mechanism. *Id.* at 636, 84 S.Ct. at 819, 11 L.Ed.2d at 961. While *Van Dusen* concluded that a change of venue should normally be considered no more than a change of court rooms, the Court qualified its holding by continuing:

> In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, state. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a)
>
> . . . . .

Id. at 639-640, 84 S.Ct. at 821, 11 L.Ed. at 963.

As of this moment, the Supreme court has not ruled on the issue left unanswered by *Van Dusen*, and our research has not found any controlling authority in the Court of Appeals for the Third Circuit. However, it has been suggested that a logical interpretation of the question left unanswered by *Van Dusen* is that when a plaintiff moves to transfer, the law of the transferee

state should apply, otherwise plaintiffs, as opposed to defendants, would be free to shop for inconvenient forums with longer limitation periods. *See* C. WRIGHT, LAW OF FEDERAL COURTS, §44 at 261-62 n. 35 (West 4th Ed.1983); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *But see*, Note, *Choice of Law In Federal Court After Transfer of Venue*, 63 CORNELL L.REV. 149, 157-58 (1977). The reasoning behind the ALI view is that it will prevent plaintiffs from using transfers to carry favorable law from one forum to another. This rationale has been followed by courts in analogous situations. *Cf. Carson v. U-Haul Co.*, 434 F.2d 916 (6th Cir.1970) (plaintiff moved to transfer to forum with longer statute of limitations; defendant not amendable to process in original forum); *Parham v. Edwards*, 346 F.Supp. 968 (S.D. Ga.1972) (justice did not require transfer from original forum, with favorable limitation period to plaintiffs but no personal jurisdiction over defendants, to forum in which service had been obtained in a similar action, but where the action was barred by the limitation period); *Mata v. Budd Co.*, 44 F.R.D. 225 (E.D.Pa.1968) (plaintiff filed lawsuit in forum where statute of limitations barred action and sought to transfer to forum with favorable limitation period); Annot., 7 A.L.R.Fed. at 27-28 (1971).

Plaintiffs argue that the law of the transferee state applies only when personal jurisdiction with the defendant is lacking or venue is improper, neither of which was contested here. *See, e.g., Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir.1984) (law of forum selected by plaintiff should govern regardless of which party initiates transfer to another district); *Martin v. Stokes*, 623 F.2d 469, 471 (6th Cir.1980) (same). *See also Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir.1980) (similar facts; law of transferor state applied where defendant initiated transfer). However, in *Gonzales*, the court held that plaintiffs are "not permitted to capture favorable law of forums which lack personal jurisdiction over the defendant by filing suit there and then transferring the action to a state that is able to assert personal jurisdiction." *Id.* at 1224. By analogy, we believe that this reasoning should apply to the facts

before us since plaintiffs could not have originally brought their second action in the forum where it has been transferred due to the applicable limitations period. We reiterate that §1404(a) only permits the transfer of an action to a "district or division where it might have been brought." 28 U.S.C. §1404(a) (emphasis added.)

We believe that, at the very least, some measure of good faith expectation of proceeding in the court in which the complaint is filed is essential to allow Plaintiffs to avail themselves of that forum's limitation period, and the filing of a complaint which is merely a procedural ploy will not suffice. *Cf. Biby v. Kansas City Life Insurance Co.*, 629 F.2d 1289, 1294 (8th Cir.1980) (filing of complaint in transferor state was merely a procedural ploy and did not commence action for purposes of tolling the limitation period).

The fact that Plaintiffs' original lawsuit in this District Court did not include the claims which were time-barred under Pennsylvania law unequivocally establishes that Plaintiffs were seeking to maneuver around this by intentionally filing a second action in an inconvenient forum to avail themselves of that forum's longer statute of limitations and its plaintiff-oriented borrowing statute. By filing a subsequent lawsuit in the Southern District of Mississippi to take advantage of that state's six-year limitation period and then moving to transfer that action with their pending action in this District Court for purposes of convenience, consolidation and efficiency, Plaintiffs are seeking the "best of both forums." While we acknowledge the strong presumption in favor of a plaintiff's choice of forum, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1062 (1947), where a plaintiff chooses a forum which is not his home forum, his choice should be given considerably less weight. *Jordan v. Delaware & Hudson Ry. Co.*, 590 F.Supp. 997, 998 (E.D.Pa.1984). This consideration becomes especially relevant here since the matters relied on by Plaintiffs in support of their transfer were known to them well before they instituted their second lawsuit.

We believe that Plaintiff's tactics in this case amount to a judicial juggling act between forums—one with a clear interest

in the litigation and one whose interest is nominal at best. The only nexus between Plaintiffs' claims and Mississippi is that the Defendant Company is registered to conduct business there, has a designated agent for service of process in that state and actually transacts some business in Mississippi. On the other hand, Plaintiffs are residents of Pennsylvania, and the claim arose in Pennsylvania directly as a result of Defendant's having conducted business within that state. Regarding the choice of law issue, even under the "center of gravity" test adopted in *Mitchell v. Craft*, 211 So.2d 509 (Miss.1968), we find that Pennsylvania substantive law would govern this dispute.

Implicit in the holding of *Van Dusen* is the rationale that §1404(a) is simply a judicial housekeeping device to assure convenience and fairness to the parties. Further, we are mindful that a transfer under §1404(a) must be "in the interest of justice." Therefore, under the facts of this case, we refuse to allow Plaintiffs to transform §1404(a) into a device which would enable them to forum shop for a favorable limitation period. *Kaiser v. Mayo Clinic*, 260 F.Supp. 900, 907 (D.Minn.1966). Since Plaintiffs were fully aware of all the relevant facts at the time they commenced both actions, including the fact that the Southern District of Mississippi was an inconvenient forum, the " 'interest of justice' would be thwarted rather than served if this Court permitted this type of 'legal footwork'." *Mata*, 44 F.R.D. at 226-27 (citations omitted).

Accordingly, Defendant's motion for summary judgment is granted as to Plaintiffs' tort claims which are barred by the limitation period of 42 Pa.C.S. §5524(2).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a/ DEERE & COMPANY

(D.C. Civil No. 85-2725)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG and ALDISERT, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Chief Judge

Dated: July 9, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 29, 1987

No. 86-3595

ALBERT J. FERENS, ETC., *Appellants*

vs.

DEERE & COMPANY

Present: GIBBONS *Chief Judge*, SEITZ and ALDISERT, *Circuit Judges*

1. Motion by appellant to recall and stay the mandate.

in the above-entitled case. Any answer which would be due by August 1, 1987, will be forwarded to you upon receipt of same.

Deputy Clerk Direct Dial 597-3135

ORDER

The foregoing motion by appellant to recall and stay the mandate is denied. Judge Aldisert would grant the stay for thirty days but no longer.

By the Court,

Chief Judge

Dated: August 6, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

HOLLY BUCKLEY and ROBERT BUCKLEY, JOHN ROTH and LINDA ROTH, LINDA K. SMITH, in her own right and as Executrix of the ESTATE OF OLLIE BURROWS, deceased, ROSALIND BLOOM and NATHAN BLOOM, DOROTHY A. REAMER, in her own right and as Executrix of the ESTATE OF WALTER H. REAMER, deceased, CHARLES D. O'BRIEN and HELEN D. O'BRIEN, in their own right and as parents and natural guardians of JENNIFER C. O'BRIEN, a minor, HAROLD M. SHULTZ and ELAINE L. SHULTZ, ROSA LEE WALKER and WILLIAM M. WALKER,

Plaintiffs

v.

NO. S86-0361(B)

BABCOCK & WILCOX COMPANY, INC.; J. RAY MCDERMOTT AND COMPANY, INC.,

Defendants

ORDER

THIS DAY the above styled and numbered cause came on, on the Defendants' Motion to Transfer pursuant to *28 U.S.C.(a)*, and Plaintiffs Response thereto, and it appearing to the Court that the fact witnesses are concentrated in or near the Middle District of Pennsylvania; the likely expert witnesses are concentrated in or near the Middle District of Pennsylvania; Plaintiffs reside in the Middle District of Pennsylvania; the incident occurred in that District; and that Court has had six years of experience handling like cases arising out of the same incident; it is, therefore,

ORDERED AND ADJUDGED that Defendants' Motion be and hereby is granted, and this action and those listed on

Exhibit "A" hereto are transferred to the United States District Court for the Middle District of Pennsylvania, together with every action now pending or heretofore commenced in this District which arises out of the Three Mile Island accident of March 28, 1979, and in which the Plaintiffs reside in states other than Mississippi and the Defendants are neither incorporated in nor have their principal place of business in Mississippi.

THIS COURT, without intending to force any result upon the transferee forum, wishes to bring to the attention of that forum the ruling of the United States District Court for the Northern District of Mississippi in the case of "Milton Gluskin v. Standard Insulations, Inc., et al," No. WC83-200-LS-P, Northern District of Mississippi, Western Division, transferring said cause to the Southern District of New York, and would respectfully indicate that this Court would be inclined to follow Chief Judge Senter's ruling, a copy of which is attached hereto as Exhibit "B", with regard to the applicability of the Mississippi statute of limitations.

THIS COURT, further Orders that the Defendants may have twenty (20) days from the date this Order is filed with the Court in the Middle District of Pennsylvania in which to file their Answer or otherwise plea.

SO ORDERED AND ADJUDGED, this the 7th day of July, A.D., 1986.

_____
UNITED STATES MAGISTRATE

APPROVED:

_____
Wm. Robert Wilson, Jr.
Attorney for Plaintiffs

_____
MICHAEL J. McELHANEY, JR.
Attorney for Defendants

EXHIBIT "A"

HOLLY BUCKLEY, et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

MILTON GLUSKIN,

Plaintiff

v. NO. WC83-200-LS-P

STANDARD INSULATIONS, INC., et al.,

Defendants.

MEMORANDUM OPINION

By order dated December 2, 1983, the court informed the parties that pursuant to 28 U.S.C. §1404(a), it was considering a transfer of this action to the United States District Court for the Southern District of New York. The parties have now been given more than thirty days in which to show cause why this action should not be so transferred. The court, having considered the memoranda submitted by the parties,[1] together with the pleadings and discovery materials, and being otherwise fully advised in the premises, is now in a position to determine the propriety of such a transfer.

28 U.S.C. §1404(a) provides that:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Under section 1404(a), a district court in which venue is proper may nevertheless transfer a civil action to any district in which it might originally have been brought if such a transfer is for the convenience of the parties and in the interest of justice. This section reflects a desire to have federal civil actions tried in the district necessitated by considerations of convenience and

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1. Several parties have not filed memoranda with the court but have indicated that they neither object to nor agree with the proposed transfer.

justice. *Van Dusen v. Barrack*, 376 U.S. 612, 616-622, 84 S.Ct. 805, 11 L.Ed.2d 945, 949-953 (1964).

A court's authority to transfer cases under section 1404(a) does not depend upon the motion or consent of the parties to an action. *Clopay Corp. v. Newell Companies, Inc.*, 527 F.Supp. 733, 737 (D. Del. 1981). Section 1404(a) empowers a district court to transfer venue on its own motion. *See Lead Indus., Inc. v. OSHA*, 610 F.2d 70, 79 n.17 (2d Cir. 1979); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 556-57 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754 (3rd Cir. 1973); *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 363 (8th Cir. 1965); *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267 (3rd Cir. 1962); *Clopay Corp. v. Newell, supra; Nation v. United States*, 512 F.Supp. 121, 127 (S.D. Ohio 1981); *Riordan v. W. J. Brerer, Inc.*, 466 F.Supp. 411, 418 (S.D. Ga. 1979). When a court *sua sponte* considers the transfer of an action, the parties must be given notice and an opportunity to be heard. *Swindell-Dressler*, 308 F.2d at 273-74; *Clopay Corp.*, 527 F.Supp. at 738. In the action *sub judice*, the parties were given notice of the possible transfer of this action on or about December 2, 1983. Parties were given fifteen days in which to show cause why this action should not be so transferred. Several extensions have been given to the parties, and they have, therefore, been accorded ample opportunity to develop and explain their positions in regard to the proposed transfer. Having thus met the requirements imposed by §1404(a) and the general principles of fairness, this court possesses full authority to transfer this action if such a transfer is warranted. *See Hite v. Norwegian Caribbean Lines*, 551 F.Supp. 390, 393 (E.D. Mich. 1982), (*citing Starnes v. McGuire*, 512 F.2d 918, 933-34 (D.C. Cir. 1974)); *Donald v. Seamans*, 427 F.Supp. 32, 32-33 (E.D. Tenn. 1976); *Stanley Works v. Globemaster Inc.*, 400 F.Supp. 1325, 1338 (D. Mass. 1975); *Monsanto Co. v. United Gas Pipe Line Co.*, 360 F.Supp. 1054, 1056 (D. DC 1973).

28 U.S.C. §1404(a) presupposes at least two forums in which the defendant is amenable to process and in which venue

is proper.[2] Thus, prior to transfer, the transferor court must establish that venue is proper in both the transferor and transferee districts with respect to every defendant and that all defendants were amenable to process emanating from both districts at the time the action was initially commended. *See Van Dusen v. Barrack*, 376 U.S. at 621-22, 11 L.Ed.2d at 952-53; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 57 S.Ct. 839, 91 L.Ed. 1055 (1947); *Lamont v. Haig*, 590 F.2d 1124, 1131 n.45 (D.C. 1978).

Venue of a diversity action, such as the action *sub judice*, is governed by 28 U.S.C. §1391(a). Pursuant to section 1391(a), venue is proper in any district in which all plaintiffs or all defendants reside or where the cause of action accrued.[3] In the action *sub judice*, venue is proper in this district, for all defendants are licensed to do business or are doing business within the State of Mississippi. Venue is also proper as to the transferee district because the plaintiff resides and/or the cause of action accrued in the transferee district.

Additionally a review of the record in this action establishes that this court possesses *in personam* jurisdiction over the defendants to this action. The diversity of citizenship of these parties will not be affected by the transfer of this action. Furthermore, all defendants to this action are subject to the *in personam* jurisdiction of, and are amendable to process in, the transferree district. Thus, the prerequisites for a valid transfer pursuant to 28 U.S.C. §1404(a) are present in the action *sub judice*.

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2. A district may be considered a district in which the action "might have been brought" even though the suit would have been barred by the statute of limitations of the transferee state, so long as the jurisdictional and venue requirements are met. *Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 n.4, *reh'g* 719 F.2d 785 (5th Cir. 1983) (*citing Van Dusen v. Barrack*, 376 U.S. 612, 621-22, 84 S.Ct. 805, 11 L.Ed.2d 945, 952, 953 (1964).

3. 28 U.S.C. §1391(c) then provides that: "A corporation may be sued in any judicial district in which it is incorporated, or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

The factors[4] to be weighted in determining the propriety of a section 1404(a) transfer were articulated by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 601, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).[5] The key consideration, as set out in section 1404(a), is the convenience of the parties and witnesses. *Wilmot H. Simonson Co. v. Green Textile Assoc.*, 554 F.Supp. 1229, 1234 (N.D. Ill. 1983); *Cambridge Filter Corp. v. International Filter Co.*, 548 F.Supp. 1308, 1311 (D. Nev. 1982). In addition, the following factors are to be considered: (1) the relative ease of access to sources of proof; (2) the availability of process to compel the attendance of witnesses; (3) the cost of obtaining the presence of willing witnesses; (4) the cost of transporting counsel and the litigants to the place of trial and living expenses at trial; (5) the public interest in the expeditious and inexpensive administration of justice, and (6) the source of applicable substantive law. *See Van Dusen v. Barrack*, 376 U.S. at 645 (1964); *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508-509; *Cambridge Filter Corp.*, 548 F.Supp. at 1311; *Holvitz v. Norfleet-Ashley, Inc.*, 369 F.Supp. 394, 398 (N.D. Miss. 1973); *Schneider v. Sears*, 265 F.Supp. 257, 263 (S.D. N.Y. 1967). Thus, a transfer to another forum "must be shown to be not only convenient, but also in the interest of justice." *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3rd Cir. 1980), 450 U.S. 909, *rev'd on other grounds, sub. nom. Hartzell Propeller, Inc. v. Reyno*, 4 U.S. 235 (1981), *reh'g denied* 455 U.S. 928 (1982).

Although a district judge has the authority to transfer an action to any district in which it "might have been brought," the

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4. When a §1404(a) transfer is initiated by the court on its own motion, the factors to be considered are identical to those considered in a case where a party moves for transfer. *Clopay Corp. v. Newell Cos.*, 527 F.Supp. 733, 737-38 (D. Del. 1981).

5. *Gilbert* involved the common law doctrine of *forum non conveniens*. The factors involved in a section 1404(a) transfer are the same as those considered on a motion to dismiss on the grounds of *forum non conveniens*. Section 1404(a) was, however, designed to give the court broader discretion than that accorded under *forum non conveniens* and to permit a transfer upon a lesser showing of inconvenience. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789, 793 (1954).

plaintiff's choice of forum is entitled to consideration. *Time Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966). It is well established that "[t]he plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations." *Howell v. Tanner*, 650 F.2d 610, 615 (5th Cir. 1981), *cert. denied* 456 U.S. 918 (1982). This does not mean, however, that the plaintiff's choice of forum is controlling, for its is merely a factor to be considered along with all the other relevant factors. *Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970); *Libby v. Russell*, 349 F.Supp. 573 (N.D. Miss. 1972); *see also Rockwell International Corp. v. Eltra Corp.*, 538 F.Supp. 700 (N.D. Ill. 1982). Additionally, where the operative facts of a case have little or no material connection with the forum state, the plaintiff's choice of forum is entitled to less weight than is ordinarily the case. *See Derry Finance N.V. v. Christiana Companies, Inc.*, 555 F.Supp. 1043, 1045 (D. Del. 1983); *Cambridge Filter Corp. v. International Filter Company, Inc.*, 548 F.Supp. 1308, 1311 (D. Nev. 1982); *Clopay Corp. v. Newell Companies, Inc.*, 527 F.Supp. 733, 737-38 (D. Del. 1981); *Coats Company, Inc. v. Vulcan Equipment Co.*, 459 F.Supp. 654 (N.D. Ill. 1978), *Credit Alliance Corp. v. Nationwide Mutual Insurance Co.*, 433 F.Supp. 688, 689 (S.D. N.Y. 1977).

An examination of the pleadings and discovery materials on file before the court reveals that a transfer of this action is warranted. The plaintiff does not reside in this state nor does plaintiff's lead counsel reside in Mississippi. Plaintiff Milton Gluskin is a resident of Bellrose, New York, and this cause of action arose in the State of New York. Few, if any, of the expert or fact witnesses reside in Mississippi, and virtually all of the plaintiff's employment and medical records are located outside of this state. Additionally, plaintiff does not appear to have been employed by a Mississippi company and worked very little, if any, within this state. Furthermore, none of the defendants are incorporated in or have their principle place of business in Mississippi.

In summary, the relationship of the present forum to the totality of the controversy involved in this lawsuit is so minimal that it does not justify retention of the case in the Northern

District of Mississippi. Thus, the convenience of plaintiff, defendants, and their witnesses and the interests of justice would be served by a transfer of this action.

Mississippi has been subject to a deluge of asbestosis cases in the past few years. The Southern District of Mississippi has now become backlogged with such cases, filings now numbering 1,167. As a result, plaintiffs have now begun filing their actions in the Northern District of Mississippi although these actions have little or no connection with this district. Although venue and jurisdiction are proper as to these actions, this court refuses to become a dumping ground for such litigation. We are of the opinion that a transfer of actions having little or no connection with this district will more equitably disperse the burden of this type of litigation.

The main concern voiced by the plaintiff relates to the question of the effect of such a transfer on the statute of limitations applicable to this action.[6] It is well established that upon a transfer of an action pursuant to section 1404(a), the transferee court must act as would the transferor court.[7] The transferee court must apply the choice-of-law rules of the transferor court. Thus, upon a transfer of this action, the transferee court must follow the choice-of-law rules of Mississippi. This choice will include the decision as to whether this action is governed by the Mississippi statute of limitations. *Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 fn 6 (5th Cir. 1982), *reh'g* 719 F.2d 785 (5th Cir. 1983) (citing *Van Dusen v. Barrack, supra); New England Merchants National Bank v.*

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6. The statute of limitations issue is also of great concern to this court. In fact, the court has informed those parties who have inquired regarding the applicable statute of limitations that a transfer of this action would not occur if it were found that plaintiff's action would be barred by the application of the statute of limitations of the transferee forum. As a result, the court has determined that a ruling on the question of the applicable statute of limitations is appropriate prior to a transfer of this action.

7. The application of the law of the transferor forum is not affected by the fact that the action was transferred on the court's own motion. *Roofing & Sheet Metal Service v. LaQuinta Motor Inns*, 689 F.2d 982 (11th Cir. 1982), *Martin v. Stokes*, 623 F.2d 496 (6th Cir. 1980); *Bott v. American Hydrocarbon Corp.*, 441 F.2d 896 (5th Cir. 1971).

Rosenfeld, 679 F.2d 467 (5th Cir. 1982); *Roofing & Sheet Metal Service v. LaQuinta Motor Inns*. 689 F.2d 982 (11th Cir. 1982); *Walker Corp. v. Burger Chef Systems*, 554 F.2d 1165 (D.C. 1977); *Farham v. Edwards*, 470 F.2d 1000 (5th Cir. 1973); *Railing v. United Mine Workers of America*, 429 F.2d 780 (4th Cir. 1970); *Carr v. American Universal Insurance Co.*, 341 F.2d 220 (6th Cir. 1965); *H. L. Green Company v. MacMahon*, 312 F.2d 650 (2nd Cir. 1962); *Headrick v. Atchison T & S Railroad*, 182 F.2d 305 (10th Cir. 1950).

"As a rule, Mississippi treats statutes of limitation as procedural, and in keeping with the accepted practice of applying procedural rules of the forum state irrespective of the choice of substantive law, the state courts generally enforce Mississippi's limitation periods and not those of foreign jurisdictions." *Cummings v. Cowan*, 390 F.Supp. 1251, 1254 (N.D. Miss. 1975). *See also Kenshaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969); *Steele v. G. D. Searle & Co.*, 422 F.Supp. 560 (S.D. Miss. 1976), *reh'g granted* 428 F.Supp. 646 (S.D. Miss. 1977). Accordingly, in Mississippi courts will normally apply the *lex fori* insofar is it relates to the Mississippi statute of limitations. *See Steele, supra; Bethlehem Steel Co. v. Payne*, 183 So.2d 912, 916 (Miss. 1966). Thus in the action *sub judice*, upon transfer, the Mississippi statute of limitations will govern the rights of the parties.[8] *See Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 794 (10th Cir. 1979) (the Mississippi statute of limitations governed the rights of the parties in an action transferrred from Mississippi to Kansas). The rights of the parties to this action will, therefore, be unaffected by a transfer of this action. The court thus finds that a transfer of this cause is warranted.

An order in conformity with this opinion shall issue.

This 15th day of March, 1984.

CHIEF JUDGE

8. The statute of limitations applicable to this action is not affected by the Mississippi Borrowing Statute, MISS CODE ANN. §15-1-65. *See Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), *reh'g en banc* 713 F.2d 100, *reh'g* 719 F.2d 785 (5th Cir. 1983).